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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE HONORABLE ARCHIE O. DAWSON,
UNITED STATES DISTRICT JUDGE FOR THE
SOUTHERN DISTRICT OF NEW YORK,

Petitioner,

—against—

THE LUMMUS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 22, 1961

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE HONORABLE ARCHIE O. DAWSON,
UNITED STATES DISTRICT JUDGE FOR THE
SOUTHERN DISTRICT OF NEW YORK,

Petitioner,

—against—

THE LUMMUS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable The Chief Justice and Associate Justices of The Supreme Court of The United States:

Commonwealth Oil Refining Company, Inc. (hereafter "Commonwealth"), prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered against The Honorable Archie O. Dawson, District Judge of the United States District Court for the Southern District of New York.*

The judgment of the Second Circuit grants a petition by The Lummus Company (hereafter "Lum-

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* Commonwealth appears herein and prays leave to be heard as the party aggrieved by the judgment of the Court of Appeals.

mus"), for issuance of a writ of mandamus vacating an order of Judge Dawson dated June 22, 1961.

Judge Dawson's order (a) directed a trial in the District Court of issues concerning the making of certain alleged "contracts" between Commonwealth and Lummus and concerning the arbitrability of certain claims in dispute between them, and (b) stayed all proceedings in connection with an arbitration demanded by Lummus, pending determination of those issues by the District Court.

Citations to Opinions Below

The opinion of Judge Dawson, dated June 7, 1961, is reported at 195 F. Supp. 572 (1961), and is printed in the certified Joint Appendix at R. 675-83, and at S.A. 73-82.* Judge Dawson's order of June 22, 1961, entered upon the opinion of June 7, 1961, is printed at R. 747-48, and at S.A. 83-85.

The opinion of the Court of Appeals for the Second Circuit, not yet reported, is printed in the certified proceedings below at R. 988-1012, and at S.A. 86-114.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision and judgment of the Court of Appeals were entered on November 14, 1961 (R. 988-1016, S.A. 86-117).

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* "R." references are to pages of the certified Joint Appendix as printed for the use of the court below (R. 1-757) and to pages of the certified proceedings in the court below (R. 758-1043). Each has been duly certified and filed with the Clerk of this Court pursuant to Rule 21(3). "S.A." references are to pages of the Supplemental Appendix filed herewith containing certain opinions and orders frequently referred to herein.

Questions Presented

1. Whether a Court of Appeals has extended the extraordinary power of mandamus beyond the limits established under the All Writs Act, 28 U.S.C. § 1651, as construed in *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), and other decisions of this Court, by granting mandamus to vacate the non-appealable interlocutory order of a District Judge, ultimately reviewable on appeal, by which that judge directs a trial of certain issues, the sole ground for mandamus being that the District Judge did not give "conclusive" effect, or the effect of "finality", to a previous decision of another Court of Appeals, rendered on an interlocutory appeal in a related proceeding between the same parties.

2. Whether a Court of Appeals has rendered a decision in conflict with *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), *Kloeb* v. *Armour & Co.*, 311 U.S. 199 (1940), and other decisions of this Court, by determining that "conclusive" effect, or the effect of "finality", must be given in an action before a District Court of its Circuit to a previous decision of another Court of Appeals rendered on an interlocutory appeal under 28 U.S.C. § 1292(a)(1), in a related proceeding between the same parties.

3. Whether a Court of Appeals has extended the extraordinary power of mandamus beyond the limits established under the All Writs Act, 28 U.S.C. § 1651, where, on review had solely under the All Writs Act, it includes in its grant of mandamus a direction that a District Court may not try certain issues, solely on the ground that the Court of Appeals would reverse any decision in favor of the contentions of one of the parties with respect to such issues when such decision

ultimately became appealable in normal course, having itself determined, on facts presented solely by affidavit, that the contentions of the other party with respect to those issues were correct.

4. Whether a Court of Appeals has enforced a procedure of compulsory arbitration in violation of the Fifth and Fourteenth Amendments to the Constitution, as construed in *Dorchy* v. *Kansas*, 264 U.S. 286 (1924), and *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522 (1923), and has thereby deprived a party of property and liberty without due process of law, by granting mandamus to prohibit a judicial determination of that party's defense to a petition to compel arbitration that, by virtue of fraudulent inducement, it has not consented to arbitration.

Statutes Involved

The statutory provision principally involved is 28 U.S.C. § 1651. Also involved are 28 U.S.C. §§ 1291, 1292(a)(1), and 1292(b). The texts of these provisions are printed, *infra*, pp. 34-35.

Statement of the Case

This litigation grows out of two alleged "contracts" by which Lummus undertook to design, construct and guarantee performance and operability of two oil refineries for Commonwealth, to be located in Puerto Rico. Commonwealth undertook to pay Lummus a total guaranteed maximum cost of $34,985,400 (R. 14, 112-13, 123). The "contracts" contained identical arbitration clauses, *infra*, p. 35.

At stake is Commonwealth's right to a trial of its charge that it was fraudulently induced by Lummus to enter into these contracts, and its concomitant right not to be compelled to arbitrate disputed claims pursuant to contracts which it claims do not exist.

Throughout the course of the litigation Commonwealth has sought a trial of the fraud issue in a United States District Court and, ultimately, an authoritative judicial determination of the standards which must govern the conduct and performance of professional engineers. Lummus seeks to avoid any judicial determination and to submit all issues, including those determinative of the existence of the contracts, to arbitrators appointed under the terms of the arbitration clause.

Commonwealth's charge of fraud is fully supported by affidavits and documents. Three United States Judges (Ruiz Nazario, J., of the District of Puerto Rico; Magruder, J., sitting by assignment in Puerto Rico; and Dawson, J., of the Southern District of New York)* have separately held that Commonwealth by these supporting materials, not sufficiently denied or explained by Lummus, has raised substantial issues of fraudulent inducement of the contracts.**

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* The opinion of Magruder, J., is reported at 174 F. Supp. 485 (D.P.R. 1959), and is printed at R. 577-87, and at S.A. 1-13. The opinion of Ruiz Nazario, J., has not been reported but is printed at R. 509-24, and at S.A. 14-32.

** The refineries have in fact been designed and constructed by Lummus but, as so designed and constructed, have proved, as Lummus knew they would prove, wholly incapable of fulfilling representations made by Lummus in precontract negotiations as to the quantities and proportions of finished products the refineries would be capable of producing, and the cost of their production.

These representations had been basic to the refinery project. They had been based on fundamental engineering calculations by Lummus of the quantities and proportions of finished products that

As a result of these holdings, Judges Ruiz Nazario and Dawson have directed that there be a district court trial of the fraud issues.

Judge Dawson, moreover, found that substantial issues had been raised by an additional Commonwealth contention that the arbitration clause, even if valid, was not applicable to certain claims of the

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could be extracted from the available crude oils, and of the cost of the refinery equipment necessary to produce such finished products (R. 232-35, 392). Lummus' representations were relied upon by Commonwealth in "contracting" with Lummus to build the refineries and induced Commonwealth's decision to embark on the project and to incur debt for its financing (R. 393, 417, 133-38; *cf.* R. 394-98, 400-04; see, *e.g.*, R. 239-58, 268-74, 318-20; for their use in connection with the financing of Commonwealth, see R. 420-21, 275-87, 136-38).

The falsity of these representations (R. 411, 583, 518), as Commonwealth's proofs tendered on rehearing in the First Circuit showed (R. 533-74), was not discovered by Commonwealth until March 1959 and, in essence, turned on the undisclosed precontract substitution of a highly experimental design of equipment for a commercially proven design (*cf.* R. 335-37), a substitution evidently made to compensate for a serious, and undisclosed, error in the product yield calculations Lummus had supplied to Commonwealth (R. 552-54; also 534-35, 573-74; compare with R. 270-74, 53).

Commonwealth contends, and would establish in a court of law, that Lummus' actions in thus attempting to conceal its basic initial miscalculations are totally at odds with, *inter alia*, even minimum standards of professional engineering and business integrity.

Instead of realizing over $11,000,000 a year of net income on the refineries, as represented by Lummus' precontract calculations, Commonwealth sustained over $14,000,000 of operating losses in the three years 1956 through 1958 (R. 424-25).

Commonwealth has paid Lummus $32,480,526 for the refineries delivered to it (R. 425-26, 456). In addition, Commonwealth has been forced to borrow and spend $10,600,000 on a major construction program to correct, improve and enlarge the refineries sufficiently to put them in an economically operable condition (R. 426). Commonwealth has long refused to pay the $4,697,997.85 that Lummus claims is due, publicly and repeatedly asserting, as it still asserts, that Lummus owes Commonwealth more on Commonwealth's claim that Lummus claims, or could claim, for its work (R. 130).

parties, and Judge Dawson, therefore, directed trial of these further issues. These matters had not been presented in Puerto Rico.

The First Circuit reversed the order of the Puerto Rican District Court. The grounds will be further described herein, but the central determination was that Commonwealth's complaint, filed in Puerto Rico, was insufficient to support a cause of action for rescission under which the fraud issue could be tendered for decision.

In a materially different procedural context, the Second Circuit, by writ of mandamus, has proscribed the trial of the fraud issue later ordered on independent consideration by the District Court for the Southern District of New York. The Second Circuit acted on the theory that the decision of the First Circuit, though rendered on an interlocutory appeal, had the effect of "conclusiveness" or "finality" in the proceedings in the Southern District; it went on to determine the issues as to the scope of the arbitration clause.

Proceedings commenced April 29, 1959, when Lummus mailed to Commonwealth a demand for arbitration in New York, purportedly pursuant to the arbitration clauses of the contracts (R. 109-10, 130-31).

On May 4, 1959, five days after the demand for arbitration was mailed, Commonwealth filed a complaint against Lummus in the United States District Court for the District of Puerto Rico (R. 111-16, 131). Commonwealth claimed (a) damages and such rescission of the contracts under the laws of the State of New York as was equitable, or (b) a declaration of

the non-existence of the contracts under the laws of Puerto Rico, alleging fraud in the inducement of the contracts (R. 114-15). At the same time, Commonwealth moved for an order staying the arbitration demanded and for a preliminary injunction restraining Lummus from taking any steps in furtherance of the arbitration (R. 117).

Some two weeks later, Lummus petitioned the New York Supreme Court, New York County, for an order to compel Commonwealth to arbitrate (R. 6-9). Commonwealth removed these proceedings to the United States District Court for the Southern District of New York, the basis of jurisdiction being 28 U.S.C. §§ 1332, 1441(a). (R. 1-3, 659-74)

Thereafter, Commonwealth's motion to stay arbitration and to enjoin Lummus from proceeding in New York came on in the Puerto Rican District Court. After extensive argument and consideration of facts submitted by affidavit, the District Court found that Commonwealth had made out a *prima facie* case of false representations, of justifiable reliance thereon, and fraudulent (or reckless) intent (R. 518, 520; S.A. 24, 27).

By its order the Puerto Rican District Court (a) fixed Lummus' time to join issue by answer to Commonwealth's complaint, (b) directed trial of the issues thus joined, including the issue of fraud in the inducement, and (c) stayed the arbitration demanded and enjoined Lummus from taking further proceedings in the Southern District of New York or in the arbitration until the Puerto Rican District Court determined by trial whether there were existing and valid arbitration agreements (R. 522-24; S.A. 30-31).

This order, strictly interlocutory, had as its main point provision for a trial of the fraud issue, and was appealable only because it incidentally granted injunctive relief, pending the trial, against Lummus' New York proceedings to compel arbitration.

Lummus did appeal to the First Circuit pursuant to 28 U.S.C. § 1292(a)(1), which provides for appeals from "Interlocutory Orders" granting injunctions.

On appeal the First Circuit reversed (280 F.2d 915 (1960); R. 473-503; S.A. 33-67).

The First Circuit decided that the District Court's preliminary findings that Commonwealth had made out a *prima facie* case of false representations, justifiable reliance thereon, and fraudulent (or reckless) intent were not reversible (R. 484-85; S.A. 46-47). However, it held that the applicable law was the law of New York (R. 487-88; S.A. 50-51), and that, because Commonwealth's complaint seeking rescission was not coupled with an intent to return the consideration — here the vast refineries in Puerto Rico — and did not assert any fraud peculiar to the arbitration clause, that complaint could not support a trial of the fraud issue raised (R. 493-97; S.A. 56-61). The First Circuit held, moreover, that Commonwealth could not maintain its action for rescission because it had not shown, in explanation of its apparently late assertion of fraud and of a right to rescind, that it had only recently discovered the fraud complained of (R. 497-99; S.A. 61-63).

On rehearing, Commonwealth tendered affidavits showing the very recent discovery of the evidence of fraud (R. 533-74), but the First Circuit stated that

having "devoted a sizable portion of the past several months to the complexities of this unusually difficult case", it had no desire to consider a new record at that stage if not shown that it had erred on the record before it (R. 506; S.A. 70-71). The Court of Appeals then said:

> "We intimated at the beginning of our opinion that there would have been sound reasons for the Court below to have deferred initially to the New York court. . . . Under the terms of the arbitration agreement arbitration will take place in New York. New York law will be controlling. We think that a court in New York should supervise the arbitration." (R. 507-08; S.A. 72)

After this Court had denied a petition for a writ of certiorari (364 U.S. 911 (1960)), the mandate of the First Circuit issued advising the Puerto Rican District Court to stay its own proceedings and ultimately to dismiss its proceedings if all issues were disposed of in New York by arbitration or otherwise (R. 598). The District Court thereupon entered an order on mandate, dated January 3, 1961, vacating its earlier order and staying all proceedings in the action brought in Puerto Rico

> ". . . until the entry of a final judgment or order by a Court of competent jurisdiction in the State of New York determining the issues of the arbitrability of the claims between the parties. . . ." (R. 526)

Thus, no final order was, or has yet been, entered in the Puerto Rican District Court.

With the focus of the litigation effectively moved to the Southern District of New York, where Lummus' petition to compel arbitration was pending (R.

724). Lummus sought to cause the American Arbitration Association to proceed with the arbitration demanded before the petition to compel arbitration was brought on for hearing in the District Court (R. 614-28, 631-46).* The Association directed that a list for the selection of arbitrators be returned by January 19, 1961.

On January 10, 1961, Commonwealth filed its answer to the petition to compel arbitration (R. 435-44). By way of defense to the petition, Commonwealth sought to establish in the Southern District that there were substantial issues as to whether it had consented to such arbitration and as to the scope of the arbitration clause. On January 18, 1961, Commonwealth moved by order to show cause, signed by The Honorable David N. Edelstein, District Judge, to bring on an immediate trial of the issues raised by its answer to the petition (R. 446-48). A stay of the arbitration proceedings was thereafter ordered by The Honorable Frederick V. P. Bryan, District Judge, pending determination of Commonwealth's motion (R. 651-56).

Commonwealth's motion came on before Judge Dawson. The issues proposed to be tried were fraud in the inducement of the contracts, a contention that certain of Lummus' claims did not, in any event, arise under the contracts, and the effect of a provision

* The American Arbitration Association by letter dated January 12, 1961 acceded to Lummus' request that it proceed without waiting for the District Court to consider the petition, stating that:

> ". . . the Association will not require that a motion to compel arbitration be made as a prerequisite to our administration and the Association will proceed with the administration of the arbitration in the absence of an agreement between the parties to the contrary or an order of the Court staying the arbitration." (R. 648)

of the arbitration paragraph exempting from arbitration claims covered by insurance.

On June 7, 1961, Judge Dawson, after considering all the evidence before him, including the evidence the First Circuit had declined to receive on rehearing, granted Commonwealth's motion for a trial of these issues. Judge Dawson found that it was "abundantly clear" that a substantial issue had been raised as to the making of the contracts. He observed that

> "If this action were still in the State court, under Section 1450 [New York Civil Practice Act], the Supreme Court judge considering the petition would set the action down for an immediate trial." (R. 682; S.A. 82)

By order dated June 22, 1961, Judge Dawson directed

> ". . . a trial of the issues concerning the making of the contracts of July 8, 1954 and March 14, 1956, and the arbitrability of the issues in conflict between the parties, . . . and staying all proceedings in connection with the arbitration demanded by the Demand for Arbitration of [Lummus] . . . pending determination of the said trial. . . ." (R. 748; S.A. 84)

Judge Dawson thereafter denied a motion of Lummus for reargument or, alternatively, for a certificate pursuant to 28 U.S.C. § 1292(b). (R. 742-45)

Lummus thereupon appealed to the Second Circuit from Judge Dawson's order (R. 749-50); Commonwealth moved to dismiss for lack of appellate jurisdiction (R. 758-59); and Lummus petitioned for issuance of a writ of mandamus in the event Commonwealth's motion to dismiss the appeal were granted (R. 756).

The appeal was duly dismissed, the Second Circuit stating that "Plainly Judge Dawson's order is not a final judgment appealable under 28 U.S.C. § 1291", and holding that the order was neither the grant nor the refusal of an interlocutory injunction within § 1292(a)(1). (R. 994-98; S.A. 93-97)

The Second Circuit granted, however, Lummus' petition for mandamus. The Court acknowledged that the extraordinary power to issue a writ of mandamus should be exercised "only in exceptional circumstances" since to do otherwise would frustrate the basic federal policy against piecemeal appeals, citing *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), and that "delay of arbitration through direction of a possibly needless trial of arbitrability *in limine* would not normally suffice to warrant the issuance of mandamus", citing *In re Union Leader Corp.*, 292 F.2d 381, 384 (1st Cir. 1961). (R. 998; S.A. 98)

The Second Circuit held that the required "exceptional circumstances" existed in the present case because the decision of the First Circuit, though admittedly not a "final judgment" under 28 U.S.C. § 1291, and rendered without considering the evidence later before Judge Dawson, should have been given "conclusive" effect, or the effect of "finality", in the Southern District of New York with respect to the issue of fraud in the inducement (R. 998-99, 1000-05; S.A. 97-98, 100-05). The Second Circuit granted that

> "'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." (R. 1004; S.A. 104)

On this theory, and although recognizing the discretionary element inherent in its definition of "finality", the Second Circuit granted mandamus to prohibit trial of the issue of fraud in the inducement, and specifically equated the "right" of Lummus "not to have to relitigate an issue so determined" to the "right to jury trial", the "right to trial before an unbiased judge", and the "right to trial directly by a judge rather than initially by a master." (R. 998-99; S.A. 98)

With respect to the issue raised by Commonwealth's contention that certain of Lummus' claims did not, in any event, arise under the arbitration clauses, and its further contention that the intent and effect of the insurance exception provided for therein was to exempt from arbitration certain additional claims in dispute, the Second Circuit acknowledged that the First Circuit's decision was not conclusive even under the broad view of "finality" adopted by the Second Circuit (R. 1000; S.A. 100). It nevertheless went on to direct, by mandamus, that the District Court could not try those issues, holding that any decision in favor of the contentions of Commonwealth with respect to those issues would be reversed on appeal when such decision ultimately became reviewable (R. 1005; S.A. 106).

We respectfully except to these determinations and suggest that the Second Circuit has improperly enlarged the scope of the extraordinary remedy of mandamus; has unwarrantably extended conclusive effect to decisions of federal courts rendered upon interlocutory appeals; has assumed powers under the extraordinary writ exceeding those available even on interlocutory and final appeals, to decide issues and to direct the future course of the litigation; and has

transgressed the requirements of due process by ordering an arbitration of a dispute where there is a substantial issue, unresolved, as to whether a party has consented to such arbitration.

REASONS FOR GRANTING THE WRIT

POINT I

By directing its writ of mandamus against Judge Dawson in the circumstances here presented, the Second Circuit has unwarrantably extended the scope of mandamus beyond the limits established by this Court in *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), and in other decisions.

The present judgment of the Second Circuit represents the first attempted exercise of the extraordinary power of mandamus, by any federal court, to reverse the decision of a District Judge on the ground that his decision, though ultimately reviewable on appeal, failed to give "conclusive" effect, or the effect of "finality" to a prior determination by a federal court of another Circuit.*

The Second Circuit would, moreover, direct by mandamus that conclusive effect be given here, where the prior decision was rendered on an interlocutory appeal. The court finds it enough to justify issuance of the writ that the interlocutory decision was not intended to be "tentative" and that an adequate hearing and opportunity for review were provided. Thus

* In *Kloeb* v. *Armour & Co.*, 311 U.S. 199 (1940), discussed under Point II, *infra*, pp. 23-24, this Court held that the mandamus power could not be exercised where a District Judge's order remanding an action to the State courts of Ohio rested on a failure to give *res judicata* effect to the prior determination of the State's highest court with respect to the critical issue.

the Second Circuit concedes that "finality", in this context, "may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again" (R. 1004; S.A. 104).

If allowed to stand by this Court, this precedent bids fair to distort beyond recognition the classic principle that mandamus "is meant to be used only in the exceptional case where there is a clear abuse of discretion or 'usurpation of judicial power'" (*Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953), cited with approval in *La Buy*, 352 U.S. at 257), and to make serious inroads into the established statutory policy against piecemeal appeals.

The Second Circuit acknowledges that mandamus should be used only in "exceptional circumstances", under *La Buy*, and that to do otherwise would frustrate the basic federal appeal policy. It recognizes that the possibility that a District Court's order may lead to "delay of arbitration through direction of a possibly needless trial of arbitrability *in limine* would not normally suffice to warrant the issuance of mandamus", citing *In re Union Leader Corp.*, 292 F.2d 381, 384 (1st Cir. 1961).

Nonetheless it holds that Judge Dawson's failure to give the First Circuit's determination conclusive effect in the context of the New York proceedings constituted the "exceptional circumstances" required by *La Buy* for issuance of the writ, on the ground that:

> "The right not to have to relitigate an issue so determined is as much entitled to extraordinary protection as the right to jury trial, *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), the right to trial before an unbiased judge, *United*

States v. *Ritter*, 273 F.2d 30, 32 (10 Cir. 1959), cert. denied, 362 U.S. 946, 950 (1960), *In re Union Leader Corp., supra*, or the right to trial directly by a judge rather than initially by a master, *La Buy* v. *Howes Leather Co., supra*." (R. 998-99; S.A. 98)

This holding, we respectfully suggest, constitutes serious and substantial error.

The cases permitting use of the writ of mandamus to enforce a petitioner's right to trial by jury, most recently followed by this Court in the *Beacon Theatres* case, constitute a specific and long-established exception, founded on the protection of this fundamental right of the litigant, to the statutory policy restricting interlocutory review. *Ex parte Simons*, 247 U.S. 231 (1918); *Ex parte Peterson*, 253 U.S. 300 (1920).

The *La Buy* case, contrary to the statement of the Second Circuit, involved the establishment of no general "right" of a litigant to issuance of the writ of mandamus to prevent reference to a master, but rather drew into question the administrative power of a Court of Appeals to enforce its reiterated views, flagrantly disregarded by a District Judge of its Circuit, as to the right to trial before a judge rather than reference to a master merely to ease a crowded docket.

The decision of Judge Dawson, even if in error in failing to apply the determination of the First Circuit, falls far short of the exceptional circumstances presented in these leading cases.*

* Paradoxically, to be compelled to undergo an arbitration to which there has been no valid consent would appear to lie much nearer the area of "exceptional circumstances" than does the situation which furnishes the basis for Lummus' petition for mandamus, granted by the Second Circuit. Even reference to a master leaves much broader scope for eventual assertion of the powers of a court than does submission to an arbitrator.

Faced with a petition to compel arbitration of certain disputes, and an answer denying valid consent to such arbitration, Judge Dawson took evidence in the form of affidavits to determine not whether there should or should not be arbitration, but only to determine whether there were substantial issues as to the validity of the alleged consent to arbitration, and as to the scope of the arbitration clause, which should first be tried. In this context he applied New York law, as had the First Circuit, found on the evidence that it was "abundantly clear" that a substantial issue as to the making of the contracts had been raised, determined that a New York "Supreme Court judge considering the petition would set the action down for an immediate trial" (R. 682; S.A. 82), and directed that a trial of the consent and arbitrability issues be held before the District Court on October 16, 1961. It may be said that, inferentially, Judge Dawson determined there was "really good reason" to determine these issues.*

To elevate an assumed error of law by Judge Dawson, in holding as he did, to the level of the "exceptional circumstances" or the "clear abuse of discretion or usurpation of judicial power" which would justify issuance of mandamus to reverse him, is to shrink

* The appropriateness of normal review practice in the case at bar is emphasized by the fact that Judge Dawson's order of June 22, 1961, with respect to which mandamus was granted by the Second Circuit on November 14, 1961, set down the District Court trial at the head of the Ready Day Calendar for October 5, 1961. As the Second Circuit conceded in its opinion, whether the result of this trial had been "an order dismissing Lummus' petition or an order directing arbitration", that order would have been appealable as a final judgment under 28 U.S.C. § 1291 (R. 994; S.A. 93). While it is too late now to achieve what might have been, the present decision of the Second Circuit should not be permitted to stand as a precedent encouraging premature appellate proceedings in other cases to come.

those concepts to the point where the mandamus power assumes the aspect of a general power to review interlocutory orders of District Courts.

The impropriety of the Second Circuit's attempted extension of *La Buy* and *Beacon Theatres* to the present circumstances is confirmed by numerous decisions of this Court holding that mandamus would not lie to permit appellate intervention by interlocutory review in cases which had been ordered to trial by a District Judge after refusal of some notionally possible summary disposition involving principles no more discretionary than those allegedly at stake here. See *Parr* v. *United States*, 351 U. S. 513 (1956); *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379 (1953); *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21 (1943); *Ex parte Chicago, R. I. & Pac. Ry.*, 255 U. S. 273 (1921); *Ex parte Park Square Automobile Station*, 244 U. S. 412 (1917); *Ex parte Roe*, 234 U. S. 70 (1914); *Ex parte Harding*, 219 U. S. 363 (1911); and *Ex parte Hoard*, 105 U. S. 578 (1882).

The need for immediate guidance by this Court, and a determination whether the standards expressed in the present decision of the Second Circuit are to stand as precedent, is further shown by the divergence of those standards from standards applied by other Courts of Appeal.

Thus the Third Circuit has held mandamus inappropriate to correct the possibly too broad effect given by a District Court to the decision of another District Court in another action between the parties, *Gulf Research & Development Co.* v. *Leahy*, 193 F.2d 302 (3d Cir. 1951), *aff'd by an equally divided Court on other issues*, 344 U. S. 861 (1952); and has indicated in a post-*La Buy* decision that this holding would be given

substantial weight if the converse question—of giving too little effect to such a decision—were to arise. *TCF Film Corp.* v. *Gourley*, 240 F.2d 711, 714 & n.5 (3d Cir. 1957).

The standards applied in the present case are also in conflict with those acknowledged and applied in numerous other post-*La Buy* decisions of the Courts of Appeal, including *Hoffa* v. *Letts*, 282 F.2d 842 (D.C. Cir. 1960); *Byram Concretanks, Inc.* v. *Meaney*, 286 F.2d 170 (3d Cir. 1961); *Green* v. *Murphy*, 259 F.2d 591 (3d Cir. 1958); *Smith's Transfer Corp.* v. *Barksdale*, 259 F.2d 498 (4th Cir. 1958); *Hotel Corp. of Cleveland* v. *United States Dist. Ct.*, 283 F.2d 470 (6th Cir. 1960); and *Boucke* v. *Weick*, 275 F.2d 38 (6th Cir. 1960). In each of these decisions the appellate court refusing the writ has carefully refrained from construing *La Buy* in a manner inconsistent with the previous decisions of this Court on the subject of mandamus. If the present decision is correct, however, *La Buy* signifies far more than these other Circuits have thus far conceded.

The effect wrought by the present decision on the balance between the powers of the Circuit and District Courts to control the initial stages of federal court litigation must also be viewed against the recent enactment of 28 U.S.C. § 1292(b). By this section, Congress made specific provision for allowance of appeals, in the discretion of the District Judge, from orders not otherwise appealable where the orders involved a "controlling question of law" the immediate resolution of which might materially advance the litigation. This enactment should be viewed as narrowing, rather than enlarging, the scope of mandamus, in circumstances such as those of the case at bar, where Lummus sought a certificate permitting appeal

under this section and its application was denied by the District Court. *Cf.* 75 HARV. L. REV. 351, 381-82 (1961). Mandamus, in the present circumstances, effectively undermines the District Court's exercise of discretion under § 1292(b) in making this ruling.*

POINT II

The Second Circuit, in holding that the interlocutory decision of the First Circuit had conclusive effect in the proceedings in the Southern District of New York, has taken a position inconsistent with the decisions of this Court in *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), and *Kloeb* v. *Armour & Co.*, 311 U.S. 199 (1940), and in conflict with decisions of other Courts of Appeal.

The Second Circuit concedes that the decision of the First Circuit was not "final" in the sense of 28 U.S.C. § 1291, but nevertheless holds that it ought to be so considered for the purpose of precluding Judge Dawson from weighing the evidence before him and determining whether Commonwealth had raised a substantial issue of fraud in the inducement.

Justifying its wide departure from the appeal concept of "finality" under § 1291, heretofore controlling in the federal law of judgments, the Second Circuit cites the contrary practice in several States (R. 1003; S.A. 103-04), and substitutes for the § 1291 standard a highly discretionary rule in which finality "may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really

* Lummus pressed no argument for mandamus upon the Second Circuit which was not advanced to Judge Dawson as a reason for granting certification.

good reason for permitting it to be litigated again." The broad guidelines for applying this new principle are said to be whether the earlier decision, now to be considered final, is thought by a second court to have been regarded as "not avowedly tentative" by the court rendering it, and whether there was an adequate hearing and an opportunity for review.

This new departure in the federal law of finality of judgments is at odds with the rule of this Court.

In the *Hoffman* case, the District Court for the Northern District of Texas had granted defendants' motion to transfer an action to the Northern District of Illinois on grounds of *forum non conveniens*, over plaintiffs' objection that transfer to the Illinois court was improper because the courts of that district lacked venue over the action and ability to command jurisdiction over the defendants. The Fifth Circuit declined to issue a writ of mandamus to vacate the order of transfer. The plaintiffs thereupon moved in the Illinois District Court, on the same grounds, for an order remanding the action to Texas. The motion for remand was denied. The Seventh Circuit, on petition for mandamus, granted the writ and directed the Illinois District Court to remand the case to Texas. This Court affirmed, holding that the Seventh Circuit had acted properly in granting the writ.*

The question of the effect in the Seventh Circuit of the prior Fifth Circuit decision was specifically considered by this Court. The dissenting opinion observed that the Fifth Circuit had "fully examined the merits" of plaintiffs' claim that the action could not properly be transferred to Illinois, and had re-

* The majority opinion noted that the parties had not raised the question of the propriety of the remedy of mandamus (363 U.S. at 340).

jected that claim (363 U.S. at 346). The dissent urged that "all the considerations bearing on the good administration of justice which underlie the technical doctrine of *res judicata*" should have been applied to preclude relitigation of the claim by the Illinois District Court and by the Seventh Circuit (*id.* at 348). This minority view is essentially the view the Second Circuit would now adopt and apply in the case at bar.

The majority of this Court reached the contrary conclusion. Expressly rejecting the *res judicata* argument of the dissent, the Court declared that "principles of *res judicata* do not apply" where the orders involved

> ". . . were (1) interlocutory, (2) not upon the merits, and (3) were entered in the same case by courts of coordinate jurisdiction" (*id.* at 340n.9).

In *Kloeb* v. *Armour & Co.*, *supra*, the Ohio state courts had granted a petition to remove a cause to the federal courts on a determination by the Supreme Court of Ohio that, under Ohio law, that cause was separable from an action against another tortfeasor in which diversity was absent. The District Court remanded the case to the state courts pursuant to 28 U.S.C. §§ 71 and 80 (now §§ 1447(c), (d) and 1359). The Sixth Circuit applied the *res judicata* principles here espoused by the Second Circuit, and granted mandamus on the ground that the District Court's determination of the issue of separability was in excess of its authority since that very issue, upon which the remand turned, had been previously adjudicated by the Supreme Court of Ohio.

On certiorari, this Court reversed and held that the District Court had not exceeded its powers by determining the question anew, pointing out the further

circumstance (also present in the case at bar) that additional facts had been placed before the District Judge and could properly be considered by him.

The three factors invoked by the Second Circuit here to justify its finding of conclusiveness were present to at least the same extent in *Hoffman* and *Kloeb*. The decisions of the Fifth Circuit and of the Supreme Court of Ohio were no more "tentative" than the decision of the First Circuit in the case at bar, nor were the opportunities for hearing or review afforded in the *Hoffman* and *Kloeb* proceedings any less.

See also *United States* v. *United States Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950) ("We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of *res judicata*.")

The Seventh and Eighth Circuits have clearly expressed adherence to a rule the contrary of that adopted here by the Second Circuit. See *Hunter* v. *Atchison, T. & S.F. Ry.*, 193 F. 2d 294, 298-99 (7th Cir. 1951); *Doeskin Products Inc.* v. *United Paper Co.*, 195 F. 2d 356, 360-61 (7th Cir. 1952); *Benson Hotel Corp.* v. *Woods*, 168 F. 2d 694, 697-98 (8th Cir. 1948); *Missouri-Kansas-Texas R.R.* v. *Randolph*, 182 F. 2d 996, 999-1000 (8th Cir. 1950); and *Chicago Great Western Ry.* v. *Chicago, Burlington & Quincy Ry.*, 193 F. 2d 975, 978-79 (8th Cir. 1952).

The Third Circuit has also regarded as well-settled to the contrary the "finality" or *res judicata* principles which the Second Circuit would now impose upon the discretion of federal trial judges. In *De Forest Radio Telephone & Telegraph Co.* v. *Westinghouse Elec. & Mfg. Co.*, 13 F. 2d 1014 (E.D. Pa. 1924), *aff'd*, 21 F. 2d 918 (3d Cir. 1927), *aff'd per curiam*, 278 U.S.

562 (1928), the Third Circuit noted (21 F. 2d at 324) that an argument was no longer being pressed that an interlocutory order of the Second Circuit, on the question of priority of invention, was *res judicata* as to the issues in the Third Circuit, having been rejected by the District Court (13 F. 2d at 1016). The Third Circuit cited on the point, as had the District Court, this Court's decision in *Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82 (1922) ("If it [the decree] be only interlocutory, the court at any time before final decree may modify or rescind it." 258 U.S. at 88).

The essence of the rule thus far followed in the federal courts is that a prior determination of an issue by another court in related proceedings, where interlocutory, and not on the merits, will not preclude a District Judge from determining the same issue. *A fortiori*, a District Judge's independent determination of the issue, contrary though it may be to the prior decision, cannot constitute an abuse of power sufficient to justify appellate correction by mandamus.

POINT III

Judge Dawson's order of June 22, 1961, directed trial not only of the issue of fraud in the inducement, but also of issues as to whether certain of Lummus' claims were within the scope of the arbitration clause, and as to the effect to be given the insurance exception in the last sentence of the clause.

The Second Circuit acknowledged that these issues, like the fraud issue, were not presently appealable, and acknowledged, moreover, that they had not been "conclusively" determined by the First Circuit, even under the broad view of "finality" declared herein

by the Second Circuit. The Second Circuit, nevertheless, granted mandamus to foreclose the District Court from trying those issues on the ground that a decision in favor of such claims would be reversed by the Second Circuit when such decision ultimately became reviewable.

All we have said under Point I hereof, with respect to the proper scope of mandamus, applies here as well. But here, in addition, with "conclusiveness" disclaimed as to these issues, there is not even a semblance of the showing of "exceptional circumstances" required to justify the use of the extraordinary writ to reverse the District Court's determination that there be a trial of these issues.

The Second Circuit, in using the writ to review Judge Dawson's otherwise unappealable order, has assumed broad ancillary powers to direct the future course of litigation in direct conflict with the established federal policy against piecemeal appeals and favoring the administration by District Courts of cases brought before them.

The Second Circuit's extension of the bounds of appellate jurisdiction, under color of the mandamus power, goes beyond even the jurisdiction asserted on appeals taken in normal course. The Second Circuit in fact assumed the function of a trial court with respect to these issues and determined them on the merits. In so doing, at least in the case of the insurance exception, the court did not simply view the contract as clear and unambiguous and thus susceptible of judicial determination as a matter of interpretation of the instrument. It in fact considered and relied upon extrinsic evidence presented in affidavits which had been submitted to the District Court for the sole

purpose of establishing whether substantial issues were in dispute between the parties and should be tried.

For example, the court relied heavily on a memorandum of Marsh & McLennan, insurance brokers, to discover the purpose of the inclusion of the insurance exception in the arbitration clause, and its intended application (R. 1009-10; S.A. 110-11), and upon an affidavit submitted by Lummus purporting to disclaim that it has insurance protection of the kind contemplated by the exception (R. 1010; S.A. 111-12). Commonwealth had no opportunity to present evidence to rebut the inferences drawn by the Second Circuit from the memorandum, nor any opportunity to cross-examine the affiant or engage in discovery of Lummus' files to determine the accuracy of the statement.

Again, paradoxically, the deprivation by the Second Circuit of Commonwealth's right to trial of disputed issues, with the concomitant benefits of discovery, cross-examination, and full presentation of relevant evidence, is far more demanding of protection than the circumstances herein considered "exceptional" by the Second Circuit.

The decision of the Second Circuit should not be allowed to stand as a precedent for the use of the extraordinary writs to review and determine, without trial, disputed issues found to be substantial by District Courts. The use of mandamus to prevent a prospectively erroneous decision upon the trial of such issues is in conflict with the prevailing rule. See *Ex parte Wagner*, 249 U.S. 465 (1919); *Hoffa* v. *Letts*, 282 F. 2d 842 (D.C. Cir. 1960).

POINT IV

By granting mandamus to prohibit judicial determination of Commonwealth's assertion of non-consent as a defense to respondent's petition to compel arbitration, the Second Circuit has ordered compulsory arbitration, violative of the guarantees of the Fifth and Fourteenth Amendments as applied by this Court in *Dorchy* v. *Kansas*, 264 U.S. 286 (1924), and *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522 (1923).*

The Second Circuit's holding that the First Circuit's decision had conclusive effect to foreclose Judge Dawson's consideration of the fraud charged by Commonwealth, ignores the critical difference in the procedural contexts within which the decisions of the First Circuit and of the Southern District were rendered.

The First Circuit was confronted with Commonwealth's complaint framed in rescission and with the Puerto Rican District Court's order directing trial of the issues thus raised. The First Circuit held that the complaint was insufficient to support a trial of

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* The Second Circuit equivocated as to whether it was accepting and applying the determination of the First Circuit that the applicable law was the New York arbitration statute, or was applying the United States Arbitration Act, stating that "we here perceive no significant difference between the two" (R. 1001 & n.7; S.A. 101 & n.7).

Therefore it is not clear whether the present holding should be considered to be in conflict with the Fifth or Fourteenth Amendment. This does not appear crucial for the purpose of the constitutional argument, since that argument is based on decisions which relate to state compulsory arbitration statutes and hold them contrary to the Fourteenth Amendment. These would apply, probably *a fortiori*, or at least with equal force, to a federal statute or procedure exhibiting the same defects.

the fraud issue because of (a) the apparent unwillingness of Commonwealth to offer back the refineries which were the consideration for the contract to be rescinded, and (b) the absence of a showing of the late discovery of the fraud alleged. The First Circuit expressly refrained from overturning the District Court's holding that a "substantial showing of fraud in the inducement had been made out, stating it was "short of willing to reverse the lower court's preliminary findings" on that issue (R. 485; S.A. 47).

In the Southern District, Judge Dawson had before him Lummus' petition to compel arbitration and Commonwealth's answer to the petition, denying consent to the arbitration demanded. There was no question of a Commonwealth complaint, or its sufficiency. None had been filed, or has yet been filed in the Southern District.

In ruling that the First Circuit determination is conclusive on the issue raised by Commonwealth's defense of non-consent, the Second Circuit deprives Commonwealth of a judicial determination of that defense and, in effect, compels Commonwealth to arbitrate. The compulsory arbitration thus ordered contravenes the standards set forth in the *Dorchy* and *Wolff* decisions, both of which held compulsory arbitration required by a Kansas statute to violate the due process clause of the Fourteenth Amendment. These decisions retain their full vigor. See *United Steelworkers of America* v. *United States*, 361 U.S. 39, 74-75 (1959) (dissenting opinion); *Application of Smith*, 381 Pa. 223, 112 A. 2d 625, 629 (1955).

The constitutionality of a deprivation of property through an award following arbitral proceedings must depend on the validity of a party's consent to such

proceedings; and arbitrators, applying procedures in themselves not constitutionally adequate, may not properly determine the threshold question of consent, where a substantial issue as to the fraudulent inducement of that consent has been raised. But see *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *cert. dismissed on stipulation*, 364 U.S. 801 (1960).*

The classic formulation of the right to a judicial determination of the issue of consent was enunciated by Chief Judge Cardozo, writing for the New York Court of Appeals in *Finsilver, Still & Moss v. Goldberg, Maas & Co.*, 253 N.Y. 382, 389-92, 171 N.E. 579, 581-82 (1930), and remains fully expressive of the law:

> "Arbitration presupposes the existence of a contract to arbitrate. If a party to a controversy denies the existence of the contract and with it the jurisdiction of the irregular tribunal, the regular courts of justice must be open to him at some stage for the determination of the issue. The right to such a determination, either at the beginning or at the end of the arbitration or in resistance to an attempted enforcement of the award, is assured by the Constitution as part of its assurance of due process of law. * * * * Nothing in the [New York] statute denies to one so situated the right to participate in the arbitration, and still contest the jurisdiction.

* In the present case, the Second Circuit made it clear that it regarded these issues as remaining open to the arbitrators:

> "We add for clarity that we do not hold any determination by the First Circuit with respect to fraud, rescission, etc. to be conclusive save on the limited issue of arbitrability." (R. 1005 n.8; S.A. 105 n.8)

> On the contrary, the section opens with the declaration that the award shall be valid, though made without previous application to the court, in those cases and in those only where the arbitration is 'pursuant to' the provisions of a contract. If it is not pursuant to a contract, if in truth there is no contract at all or none calling for arbitration, the self-constituted tribunal is a nullity, without power to bind or loose by force of its decision. . . . In the absence of a contract expressing a consent to arbitrate, an award by an arbitrator is an act of usurpation. Nowhere does the statute say that its quality shall be different. As an act of usurpation, it is subject to be challenged whenever and wherever it is put forward by the usurper as a source of rights and duties. Till there is an adjudication of its validity by a competent judicial officer, as for example upon motion after due notice to confirm or to vacate it, the issue of jurisdiction is open at the instance and for the benefit of any litigant aggrieved."

The present decision of the Second Circuit falls far short of the common sense and fundamental fairness of this approach. The Second Circuit's direction that conclusive effect be given the First Circuit's decision, forecloses Commonwealth from a trial of its defense of non-consent because it failed to meet the Spartan condition for rescission imposed by the First Circuit:

> ". . . . Commonwealth has no wish to make restoration and go out of business. But if a party that has acquired a business wishes rescission, this is exactly what it must do." (R. 496; S.A. 59)

Such rigorous conditions and harsh consequences may still attach to affirmative pleading in rescission,

as the First Circuit held.* They cannot, however, with constitutional propriety, be imposed to bar a litigant from defending against a claim that he has consented to waive his right to judicial determination of claims against him, and has submitted instead to arbitration. *Cf. Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 594 (1926).**

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* The Second Circuit has held under New York Civil Practice Act § 112-g, that no such rigors apply even to a complaint in rescission. See *Ciletti* v. *Union Pac. Ry.*, 196 F.2d 50, 52 (2d Cir. 1952).

** In the *Devonshire* case, *supra* the Second Circuit held that the United States Arbitration Act would govern questions as to the validity and interpretation of arbitration clauses in contracts in interstate commerce, and that under that Act a general allegation of fraud in the inducement of the contract, not relating specifically to the inducement of the arbitration clause, could not prevent arbitration of the fraud issue.

The constitutional issue here presented would not be reached if, in line with the *Devonshire* decision, this Court were to hold the federal Arbitration Act applicable, but contrary to that decision, were not to construe the Act to require arbitration of the fraud in the inducement question. If this disposition is considered possible, it is respectfully suggested that the parties are in a posture to brief the subsidiary question of the applicability of the Act were this Court to grant this petition and express its desire for such a presentation.

CONCLUSION

It is therefore respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

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December 22, 1961

Statutes Involved

All Writs Act, 28 U.S.C. § 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 1291

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292(a)(1)

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

28 U.S.C. § 1292(b)

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

ARBITRATION CLAUSE

25.1 Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association. This Agreement shall be enforceable and judgment upon any award rendered by all or a majority of the arbitrators may be entered in any court having jurisdiction. The arbitration shall be held in New York, U.S.A. It is agreed, however, that this Agreement shall not apply to claims or damages for which either party has contracts of insurance protecting their respective interests.